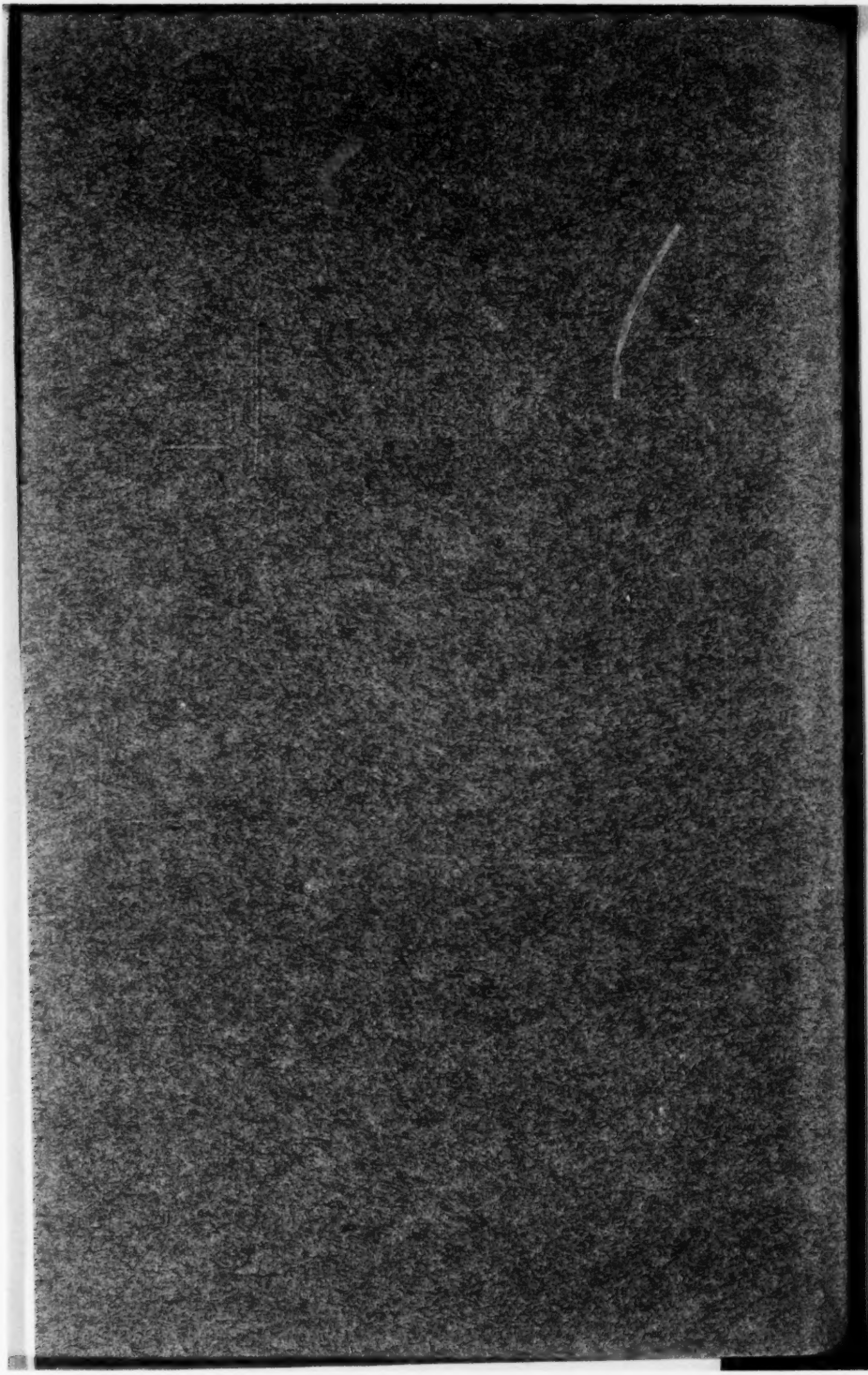

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407959—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 324

JAMES C. B. MILLARD, AS EXECUTOR OF THE WILL OF JAY GOULD, DECEASED, PETITIONER

v.

HARRY L. MALONEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 77) is reported in 36 F. Supp. 41. The opinion of the Circuit Court of Appeals (R. 99) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1941. (R. 104.) The petition for a writ of certiorari was filed on July 31, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The decedent created a trust in 1922 providing that the income should be paid to him during his life, and upon his death the principal to be paid to his descendants in such proportions as he should by his will appoint, or, if he should leave no descendants, to the persons named in his will, with the right reserved and subsequently exercised by the decedent to charge the trust fund by will with the payment of the income therefrom to his wife during her life. The decedent died in 1935, survived by his wife and three children. The question is whether the value of the corpus of the trust created by the decedent is includible in his gross estate under section 302 (d) of the Revenue Act of 1926.

2. In 1927 a judgment was entered whereby the decedent and his executors or administrators became entitled to the payment of certain amounts until the death of the survivor of the two payors. The question is whether the commuted value as of the date of decedent's death of the payments receivable under the judgment entered in 1927 is includible in the gross estate of the decedent under section 302 (a) of the Revenue Act of 1926.

STATUTES INVOLVED

Revenue Act of 1926, 44 Stat. 9 (26 U. S. C. sec. 411):

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.
>
> (h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Revenue Act of 1934, 48 Stat. 680 (26 U. S. C. sec. 411):

> SEC. 401. REVOCABLE TRUSTS.
>
> Section 302 (d) of the Revenue Act of 1926 is amended to read as follows:

> "(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

STATEMENT

The facts, as alleged in the complaint and admitted by answer (R. 2–34, 35–40), as stipulated (R. 41–52), and as found by the District Court (R. 89–90), may be summarized as follows:

The decedent, Jay Gould, sometimes referred to as Jay Gould II, died testate on January 26, 1935, survived by his widow and three children (R. 3, 8, 36, 51).

A deficiency in estate taxes was assessed by the Commissioner of Internal Revenue against the estate of the decedent arising out of the inclusion in the gross estate of the decedent of two separate items (R. 8–10, 37–38). The executor of the decedent's estate paid the deficiency, filed a claim for refund, and, upon its rejection, instituted the present suit against the Collector of Internal Revenue for the First District of New Jersey. (R. 2–3, 13–15, 39.)

The first item included by the Commissioner in the gross estate of the decedent, giving rise to a portion of the deficiency assessment in question, consisted of the value of the corpus of a trust created by the decedent on October 19, 1922 (R. 4, 6–9, 36–37). Under the trust indenture the decedent was to receive the net income during his lifetime and upon his death the principal of the trust fund was to be distributed as follows: (a) to the decedent's descendants, in such proportion as he should appoint by his will, otherwise *per stirpes;* (b) if there were no descendants, then to the persons named in decedent's will, otherwise to those who would take under the New York rule as to the personal property of an intestate; and (c) subject to the power of the decedent by will to direct that the trust income be paid to his wife for her life or any shorter period (R. 21–22, 44–45).

By his will, dated June 29, 1934, the decedent charged the trust fund, created by the agreement of October 19, 1922, with the payment of the income therefrom to his wife for her lifetime (R. 75, 89).

The second item included in the decedent's gross estate out of which the remainder of the deficiency assessment in question arose consisted of the commuted value, as of the date of decedent's death, of certain payments due under a judgment entered on May 31, 1927, by the Supreme Court of the State of New York. This judgment was entered pursuant to a compromise in litigation commenced in

1916 for an accounting in which the parties sought to surcharge the trustees of the estate of decedent's grandfather for sums aggregating in excess of $20,000,000. (R. 42–44.) As a result of the judgment, certain amounts became payable to the decedent, and his executors or administrators for and during the lifetimes of Helen G. Shepard and Howard Gould, until the death of either, and thereafter certain reduced amounts were payable until the death of the survivor. Payments under the judgment were made to the decedent until his death on January 26, 1935, and thereafter to his executor. (R. 43–44, 89–90.)

The District Court held that the two items in question were properly included in the gross estate of the decedent (R. 90), and its judgment was affirmed by the Circuit Court of Appeals (R. 104).

ARGUMENT

I

1. The first question involves the inclusion in the decedent's gross estate under section 302 (d) of the Revenue Act of 1926, 44 Stat. 9, of the value of the corpus of a trust created by him in 1922. That section provides that there shall be included in a decedent's gross estate the value at the time of his death of property transferred in trust where the enjoyment thereof was subject at the date of his death "to any change" through the exercise of a power to alter, amend, or revoke.

Under the trust agreement the decedent had the power to create by will a life estate in favor of his wife, and this power was in fact exercised by him. The decedent further had the power to designate the proportions in which his descendants should share in the principal of the trust upon his death. The decedent's three children survived him, and thus at the date of his death the decedent had the power to make substantial changes in the course of the devolution of the property transferred in trust, for he could have selected any one of his children as the ultimate beneficiary, and have entirely divested the other children of any interest in the property.

The fact that the decedent could not exercise the retained power in favor of himself or in such a manner as to regain the property is immaterial under section 302 (d). *Porter* v. *Commissioner,* 288 U. S. 436; *Witherbee* v. *Commissioner,* 70 F. (2d) 696 (C. C. A. 2), certiorari denied, 293 U. S. 582; *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3), certiorari denied, 291 U. S. 660; cf. *Rasquin* v. *Humphreys,* 308 U. S. 54. Also if, as here, the settlor retains the power to make substantial changes in the terms of a trust, the property is to be included in his estate under section 302 (d) even though the settlor does not have an unrestricted choice as to beneficiaries. *Chickering* v. *Commissioner,* 118 F. (2d) 254 (C. C. A. 1), pending on petition for certiorari, No. 153, present Term; *Com-*

missioner v. *Chase Nat. Bank,* 82 F. (2d) 157 (C. C. A. 2), certiorari denied, 299 U. S. 552; *Holderness* v. *Commissioner,* 86 F. (2d) 137 (C. C. A. 4); *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.).

2. Similar arguments to those made by the taxpayer in the present case are advanced in the petition for certiorari in *Chickering* v. *Commissioner, supra,* and this Court is respectfully referred to the Government's brief in opposition in that case for our answer to the contentions that the decision below applying Section 302 (d) to this case violates the Fifth Amendment to the Constitution and that the decision conflicts with *Helvering* v. *Helmholz,* 296 U. S. 93.

3. The case of *White* v. *Poor,* 296 U. S. 98, cited by the petitioner as being in conflict with the decision below, is irrelevant here. This Court's decision was based on the ground that the settlor did not retain, in the original declaration of trust, a power to alter, amend, or revoke, but acquired any right to participate in a future termination of the trust solely by virtue of the action of the other trustees and beneficiaries in selecting her as a trustee subsequent to the creation of the trust.

4. *Brady* v. *Ham,* 45 F. (2d) 454 (C. C. A. 1), and *Cover* v. *Burnet,* 53 F. (2d) 915 (App. D. C.), relied upon by the petitioner as in conflict, were, we submit, overruled by this Court in *Porter* v. *Commissioner,* 288 U. S. 436, 440. Furthermore, the more recent views of the First Circuit and the Court of

Appeals for the District of Columbia are expressed in *Chickering* v. *Commissioner, supra,* and *Dort* v. *Helvering,* 69 F. (2d) 836 (App. D. C.), certiorari denied, 293 U. S. 569, 630, which agree with the decision in the present case.

5. The decisions in *Mackay* v. *Commissioner,* 94 F. (2d) 558 (C. C. A. 2), and *Commissioner* v. *Flanders,* 111 F. (2d) 117 (C. C. A. 2), cited by the petitioner, are clearly not in conflict with the present case. Those cases involved situations where the right to alter or revoke could be exercised only with the consent of the person beneficially interested. The court in its opinion in the *Mackay* case makes it clear (p. 562) that it was not overruling its decision in *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157, which is on all fours with the case at bar.

II

The second question involves the inclusion in the gross estate of the decedent of the value as of the date of his death of the payments receivable under the judgment of the Supreme Court of New York; no question is raised as to the commuted value used by the Commissioner. The judgment provided that certain amounts should be paid to the decedent and his executors or administrators until the death of the survivor of Howard Gould and Helen G. Shepard. We submit that the court below properly held that the decedent had an absolute right to receive these payments for a period limited by the

lives of others, and that the commuted value of the payments should be included in the decedent's estate under section 302 (a) of the Revenue Act of 1926, *supra*.

The right to receive the annual payments until the death of the survivor of the two persons on whose lives the payments were limited was a valuable right which could be sold at any time. The payments accruing after the death of the decedent were subject to the claims of his creditors and his executor testified that the money was actually being used for payments of debts. (R. 65.) The payments were accordingly subject to all of the elements that warrant the inclusion in the decedent's estate; they were subject to sale, they were liable for the payment of the decedent's debts, and the decedent had the power to dispose of them during his lifetime or by will as he saw fit. They were analogous to an estate in real property *pur autre vie*. The Treasury Regulations provide that the value of such interest should be included in a decedent's estate. Treasury Regulations 80 (1934 Ed.), Article 11. See also *Kinney's Estate* v. *Commissioner*, 80 F. (2d) 568 (C. C. A. 9).

Bull v. *United States*, 295 U. S. 247, relied upon by the petitioner, presented quite different facts. There this Court held that the profits of a partnership, continued after the death of a decedent member, were income to the executors but that they could not be treated as part of the decedent's estate

since the partners had contributed no capital and owned no tangible property connected with the business. The present case does not involve a partnership, where the income arose as a result of activities subsequent to decedent's death, but is a case where the decedent was without more entitled to the payment of a certain sum of money during the lifetime of two other persons. There is no dispute that as of the date of the decedent's death the right to receive that sum of money had a value, and it is the value of the right to receive that has been included in the decedent's estate.

Chemical Bank & Trust Co. v. *Commissioner,* 37 B. T. A. 535, cited by the petitioner, involved a joint and survivor annuity and the decedent had no power to dispose of the proceeds after his death. *Dimock* v. *Corwin,* 19 F. Supp. 56 (E. D. N. Y.), affirmed on other points, 99 F. (2d) 799 (C. C. A. 2), and 306 U. S. 363, is also distinguishable. While there the decedent had a right to nominate or designate the person who should receive a death benefit, the district court held that the right was of such a nature that it could not have been levied upon to satisfy judgment against the decedent during his lifetime; nor could the right have been sold or assigned by the decedent.

CONCLUSION

There is no conflict in the decisions and no question of importance is presented. The decision of

the court below is clearly correct, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted.

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AUGUST, 1941.

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